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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-706

E. A. McQUADE TOURS, INC.,

Petitioner,

v.

CONSOLIDATED AIR TOUR MANUAL COMMITTEE *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	PAGE
Questions Presented	1
Statement	2
1 – Background	2
2 – Proceedings at the District Court	3
3 – Decision of the Court of Appeals	3
Argument	5
I. The Decision of the Court of Appeals, Applying the Rule of Reason to the Fully-Developed Record and Determining that CATM may Adopt and Enforce on a Nondiscriminatory Basis Reasonable Rules for Acceptance and Rejection of Tour Programs submitted for Publication in its Mannual, is not in Conflict with the Applicable Decisions of this Court	5
II. The Decision of the Court of Appeals, Determining on Examination of the Fully-Developed Record that "the facts of this case do not present a violation of the Sherman Act" and Ordering Dismissal, did not violate the Seventh Amendment	11
Conclusion	17

CITATIONS

Cases:

Appalachian Coals, Inc. v. *United States*, 288 U.S. 344 (1933) 10

Baltimore & Carolina Line, Inc. v. *Redman*, 295 U.S. 654 (1935) 11

Board of Trade v. *United States*, 246 U.S. 231 (1918) 6, 10

Bridge Corp. of America v. *American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971) 10

Cartrade, Inc. v. *Ford Dealers Adv. Ass'n.*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972) 10

Cement Mfgs. Protective Ass'n. v. *United States*, 268 U.S. 588 (1925) 10

Deesen v. *PGA*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) 6, 10

Elder-Beerman Stores v. *Federated Dept. Stores*, 459 F.2d 138 (6th Cir. 1972) 10

Fashion Originators Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941) 8

Florists Nationwide Telephone Delivery Network v. *Florists Telegram Delivery Ass'n.*, 371 F.2d 263 (7th Cir. 1967) 6

Gamco, Inc. v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) 6

J. I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 14

Johnson v. *New York, N.H. & H. RR.*, 344 U.S. 486 (1952) 12

Joseph E. Seagram & Sons v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) 10, 13

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 5, 7

Lamb Enterprises, Inc. v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972) 10

Maple Flooring Mfgs. Ass'n. v. *United States*, 268 U.S. 563 (1925) 9

Neely v. *Eby Construction Co.*, 386 U.S. 317 (1967) 12-14

New York, N.H. & H. R.R. v. *Henagan*, 364 U.S. 441 (1960) 12

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) 5, 7

Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) .. 14

Ruddy Brook Clothes, Inc. v. *British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952) 10

Sentilles v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959) 14

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 5, 7, 10

Slocum v. *New York Life Insurance Co.*, 228 U.S. 364 (1913) 11

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 10

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 10

United States v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) 10

United States v. *Generes*, 405 U.S. 93 (1972) 12

United States v. *Johnson*, 268 U.S. 220 (1925) 14

White Motor Co. v. *United States*, 372 U.S. 253 (1963) 10

Statutes:

Clayton Act §4, 15 U.S.C. §15 3

Federal Aviation Act §414, 49 U.S.C. §1384 3

Sherman Act §1, 15 U.S.C. §1 ..... 5, 7, 9, 11, 13

Rules of the Supreme Court:

Rule 23(1)(c) 13

Rule 40(1)(d)(2) 14

Miscellaneous:

FED R. CIV. P. 50(b), (c), (d) 11, 12

Note, 71 HARV. L. REV. 1531 (1958) 6

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BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

1. Whether the decision of the Court of Appeals, applying the rule of reason to the fully-developed record and determining that CATM may adopt and enforce on a non-discriminatory basis reasonable rules for acceptance and rejection of tour programs submitted for publication in its Manual, is in conflict with the applicable decisions of this Court.

2. Whether the decision of the Court of Appeals, determining on examination of the fully-developed record that "the facts in this case do not present a violation of the Sherman Act" and ordering dismissal, violates McQuade's Seventh Amendment rights.

Statement

1. *Background.*

Respondents, the Consolidated Air Tour Manual Committee and its air carrier members ("CATM") respectfully refer the Court to the statement of facts by the Court of Appeals (Pet. 2a-7a).[1]

Petitioner, E. A. McQuade Tours, Inc. ("McQuade") has participated in the Consolidated Air Tour Manual ("the Manual") since its origin in 1961. (JA[2] 93, 705; Pet. 5a). As of the time of trial, March 1971, McQuade had submitted over 2,000 tour programs for publication in the Manual. All but the twelve programs involved in the instant case, including all programs submitted by McQuade subsequent to the Summer 1968 Manual, were approved by CATM and published. (JA 201-02; Pet. 5a).

For the Summer 1968 Manual, McQuade submitted programs for 191 hotels including eleven Miami Beach hotels (JA 132-33, 1354-72). McQuade's Miami Beach programs, along with Miami Beach programs submitted by eight other tour operators, were accepted by CATM on condition that the operators furnish express written authorizations to represent the hotels in the Manual. The other eight operators provided the requested proofs of authorization. McQuade did not, and eleven of his programs ultimately were omitted from the Miami Beach section of that one issue of the Manual because of that failure to furnish the specific authorizations required by the CATM rules of which McQuade had been notified and repeatedly reminded. (Pet. 7a; JA 124-25, 819, 882-96, 929, 1314-53).

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[1] "Pet." refers to the Petition for a Writ of Certiorari filed herein by E. A. McQuade Tours, Inc.

[2] "JA" refers to the joint appendix filed in the Court of Appeals.

2. *Proceedings at the District Court.*

At trial, CATM argued that its actions in not publishing several McQuade tours were immune from the antitrust laws since the Civil Aeronautics Board had approved publication of the Manual and CATM rules adopted and implemented to accomplish that end were beyond the reach of antitrust prohibitions by reason of Section 414 of the Federal Aviation Act, 49 U.S.C. §1384. CATM also argued that its rules and actions were reasonable and wholly lawful under the rule of reason. The district court, however, concluded that CATM had engaged in a per se violation of the antitrust laws (Ja 1111-12) and charged the jury (JA 1120-21, 1205-07) that it could find for CATM only if it found both that the rules adopted by CATM were "necessary" (and thus immunized under the Federal Aviation Act) and that the rules were fairly applied to McQuade.

3. *Decision of the Court of Appeals.*

CATM argued to the Court of Appeals that McQuade lacked standing to sue under Section 4 of the Clayton Act as it had not been injured in its business or property, pointing out that the suit was based on a non-existent "right" to represent the Miami Beach hotels in the Manual. The Court of Appeals, after quoting from the record (Pet. 9a), noted (Pet. 10a):

> . . . [N]o right of representation in the Manual was referred to in McQuade's letters. Moreover, its tour operator agreements with the eleven hotels were silent concerning his right to represent them in the Manual, and management personnel of each of the hotels testified that the contracts with McQuade were in no sense intended to grant it such rights.

The court then stated that the tour operator agreements presented to CATM by McQuade "cannot reasonably be con-

strued as giving McQuade the right to represent the hotels in the Manual" (Pet. 22a). The court concluded, however, that because "McQuade was in business as a tour operator" (Pet. 12a), McQuade "thus has standing to assert whatever rights it might have under the antitrust laws" (Pet. 13a).

The court then considered "whether, and to what extent, McQuade has any rights under the antitrust laws." (Pet. 13a). The court discussed the per se rule at length (Pet. 15a-19a) and concluded that it should not be applied to this case in the total absence of the "touchstone" of the per se cases, – "exclusionary and coercive conduct" which may be viewed as a " 'naked restraint of trade.' " (Pet. 18a-20a).

The Court of Appeals perused the fully-developed record and considered whether, under the circumstances, the exclusion of the twelve McQuade programs "was an unreasonable restraint of trade." (Pet. 20a). The court concluded that any injury suffered by McQuade with respect to the 1965 incident was not attributable to CATM. (Pet. 20a). As to the 1968 incident, the court concluded that CATM rules requiring tour operators to submit proof that they were authorized to represent a hotel in the Manual were "reasonable on their face." (Pet. 20a-21a). The court found the rules served CATM's legitimate business objective of publishing a manual with the carriers' imprimaturs which would attract responsible operators and could be relied upon by the public. (Pet. 20a-21a).

The court further concluded that the rules were not applied to McQuade arbitrarily or discriminatorily, that McQuade's competitors were required to comply, and did comply, with the rules and that "there is undisputed evidence that the rules could be complied with easily and quickly." (Pet. 21a).

The court noted,[3] that it did not reach several of CATM's contentions. The court ruled "that the facts in this case do not present a violation of the Sherman Act by CATM" (Pet. 22a) and reversed with directions to dismiss.

Argument

I.

THE DECISION OF THE COURT OF APPEALS, APPLYING THE RULE OF REASON TO THE FULLY-DEVELOPED RECORD AND DETERMINING THAT CATM MAY ADOPT AND ENFORCE ON A NONDISCRIMINATORY BASIS REASONABLE RULES FOR ACCEPTANCE AND REJECTION OF TOUR PROGRAMS SUBMITTED FOR PUBLICATION IN ITS MANUAL, IS NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A writ of certiorari is sought in this case on the ground that the decision below is in conflict with the applicable decisions of this Court. It is submitted that the decision of the Court of Appeals, applying the rule of reason and finding the per se rule inapplicable to the specific, sui generis situation here involved, is consistent with the applicable decisions of this Court, and the writ should be denied.

McQuade claims (Pet. 10-11) that the decision below is in conflict with *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Those decisions are not applicable.

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[3] "Owing to our disposition of this appeal, we do not reach the issue of antitrust immunity, nor do we reach a second contention by CATM, that McQuade's claims fall within the primary jurisdiction of the Civil Aeronautics Board." (Pet. 14a, n.7). In addition, the court did not reach CATM's contention that McQuade's damage evidence was grossly insufficient and should not have been submitted to the jury.

Preliminarily, it should be noted that the court below did not, as McQuade claims (Pet. 10), find "a collective refusal to deal which adversely affected competition." The court did not find that "competition" had been adversely affected. The court did note McQuade's "deceptively simple" (Pet. 16a) argument of a collective refusal to deal, but stated: "While we agree with McQuade that the airlines collectively refused to deal with it, we do not agree that CATM's conduct is to be governed by the *per se* rule." (Pet. 16a). The CATM carriers "collectively refused to deal" with McQuade only in the sense that any CATM determination was a "collective" decision of the carriers and only in the sense that failure to publish 12 of McQuade's 2000-plus tour programs was a "refusal to deal." It is also true, however, that this "collective refusal to deal," as are many,[4] was not per se violative of the antitrust laws, as the Court of Appeals properly held.

The Court of Appeals considered the cases cited by McQuade and properly distinguished them from the

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[4] In analyzing collective refusals to deal, it is necessary to distinguish between refusals by economically productive groups such as CATM, or joint ventures, and concerted actions by groups organized for other purposes. *See* Note, 71 HARV. L. REV. 1531, 1536 (1958). For this purpose, a joint venture may be defined as (*id.*) "a group which undertakes an economically productive activity in concert . . . in order to eliminate the economic waste involved in duplication of efforts." In its order approving the formation of CATM (JA 1284), the CAB noted that one of CATM's primary purposes was to "lower production and distribution costs to carriers and tour operators."

The courts recognize the propriety of the establishment by economically productive groups of reasonable rules to exclude "applicants" or to govern the business practices of member-competitors. *See, e.g.*, Board of Trade v. United States, 246 U. S. 231 (1918); Florists Nationwide Telephone Delivery Network v. Florists Telegram Delivery Assn., 371 F.2d 263 (7th Cir. 1967); Deesen v. PGA, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U. S. 846 (1966); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U. S. 817 (1952).

present case. (Pet. 16a-18a). The court analyzed the per se collective refusal to deal cases and found they "fall into roughly three categories." (Pet. 16a). *Silver* v. *New York Stock Exchange*, noted the court, falls within that class of cases which

> involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. (Pet. 16a).

Silver involved an absolute, unqualified and unexplained ban on certain dealings with an outsider who was a direct competitor of those effectuating the ban, – a collective determination which was described by this Court, moreover, as occurring "under totally unjustifiable circumstances."[5] 373 U.S. at 361.

The Court of Appeals also considered *Klor's Inc.* v. *Broadway-Hale Stores, Inc.* and *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, stating that they are illustrative of a second category of group boycott cases where the per se rule has been applied – those

> involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some member of the combination. (Pet. 17a).

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[5] In *Silver*, this Court stated that "*absent* any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act." 373 U.S. at 348-49 (emphasis added). This Court thus considered the collective refusal to deal with Silver by his direct competitors, and found it to be without any explanation and "under totally unjustifiable circumstances." 373 U.S. at 361. In the present case, no competitors of McQuade were involved in CATM's decision not to publish several of McQuade's submitted programs. There was no CATM "ban" on dealing with McQuade. CATM accepted and rejected McQuade tours on the basis of the same reasonable rules as it accepted and rejected tours offered by McQuade's competitors. McQuade was aware of CATM's rules and was given numerous opportunities to comply. Unlike the action in *Silver*, CATM's action was totally justified, explainable and reasonable.

Illustrative of the third category of group boycott cases where the per se rule has been applied is *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941). That group of cases, the court said (Pet. 17a), concerns "combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." In *Fashion Originators Guild*, this Court noted that coercion designed to eliminate a rival method of competition precluded application of the rule of reason.

After reviewing those per se cases and others, the court below stated:

> In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade," and have fallen victim to the *per se* rule. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal. (Pet. 18a).

Analyzing the record, the Court of Appeals found it "barren" of the "exclusionary or coercive elements necessary for invoking the *per se* rule." (Pet. 19a). Further, the Court of Appeals noted that: McQuade "neither alleged nor proved that CATM's conduct was motivated by a desire to exclude McQuade from the wholesale tour market"; "neither CATM nor its member airlines are in direct competition with McQuade"; "no proof was offered to indicate that CATM or the airlines were monopolizing or attempting to monopolize" the wholesale tour market; there is not the "slightest hint that the refusal to list McQuade's tours was an attempt to somehow influence McQuade's business practices and thereby achieve some anticompetitive goal of CATM"; there "is no suggestion anywhere in the record that

CATM combined or conspired with McQuade's natural competitive enemies, the other tour operators, to deprive McQuade of a vital listing in the Manual"; and "there is nothing to suggest that CATM applied its standards to McQuade in a discriminatory fashion." (Pet. 19a-20a).

In *Maple Flooring Mfgs. Ass'n* v. *United States*, 268 U.S. 563, 579 (1925), this Court cautioned that

> . . . it should be remembered that this court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new cases to which the rule of earlier decisions is to be applied.

In accordance with this Court's *Maple Flooring* guideline, the court below refused blindly to apply per se principles pronounced in cases basically dissimilar to the present case. Rather, the Court of Appeals carefully analyzed the record, recited the elements lacking in this case which are present in per se cases, and properly applied the rule of reason, just as this Court does when faced with an antitrust case dis-

similar to those it has considered before.[6] *See, e.g., United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 373-74 (1967); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); and *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953).

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[6]Petitioner's statement (Pet. 11) that "[t]here is no precedent in this Court or in any court of appeals, for use of the rule of reason to test such a restraint of trade" cannot go uncorrected. Practices which have been singled out for per se condemnation in some cases have been held lawful under the antitrust laws in other cases involving different circumstances. For example, the courts, including this Court, have recognized that specific situations may justify disregard of the per se presumption in proceedings involving collective refusals to deal. *See, e.g.*, Silver v. New York Stock Exch., 373 U. S. 341, 360 (1963); Elder-Beerman Stores v. Federated Dept. Stores, 459 F.2d 138 (6th Cir. 1972); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), *cert. denied*, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972); Cartrade, Inc. v. Ford Dealers Adv. Ass'n., 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U. S. 997 (1972); Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U. S. 940 (1971); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); Deesen v. PGA, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U. S. 846 (1966); and Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U. S. 816 (1952).

This Court also has recognized the inapplicability of per se presumptions to specific situations involving: vertical territorial limitations, *see* White Motor Co. v. United States, 372 U. S. 253 (1963); tying arrangements, *see, e.g.*, Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 605-10 (1953); monopoly power, *see* United States v. E. I. duPont de Nemours & Co., 351 U. S. 377 (1956); and even price stabilization, *see* Board of Trade v. United States, 246 U. S. 231 (1918); Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933); and Cement Mfgs. Protective Ass'n. v. United States, 268 U. S. 588 (1925).

II.

THE DECISION OF THE COURT OF APPEALS, DETERMINING ON EXAMINATION OF THE FULLY-DEVELOPED RECORD THAT "THE FACTS OF THIS CASE DO NOT PRESENT A VIOLATION OF THE SHERMAN ACT" AND ORDERING DISMISSAL, DID NOT VIOLATE THE SEVENTH AMENDMENT.

The Court of Appeals properly reviewed the evidence which was submitted to the jury below and found that judgment should be entered for CATM. McQuade's contention (Pet. 14) that it was thus deprived of its Seventh Amendment right to a jury trial is totally without merit.

The doctrine of *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364 (1913), relied on by McQuade (Pet. 15), has long since been modified by decisions of this Court and Rule 50(b), FED. R. CIV. P. Mr. Chief Justice Hughes, dissenting in *Slocum*, foretold the proper interpretation of the Seventh Amendment right to a jury trial. In commenting on the action of a court of appeals in reversing, with directions to dismiss, a district court judgment pursuant to a jury verdict for plaintiff, he stated (228 U.S. at 428):

> There has been no invasion of the province of the jury. That conclusively appears from the fact that this court holds that there was no basis for finding by the jury in favor of the plaintiff. We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record.

Slocum was expressly modified by *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935), wherein this Court found that a judgment of reversal for error in denying motions for directed verdict and judgment notwithstanding the verdict should embody a direction for dismissal

on the merits and not for a new trial. It found that such a judgment of dismissal would properly be equivalent to a judgment for the defendant on a verdict directed in his favor.

Thereafter, this Court, in *Johnson* v. *New York, N.H. & H. R.R.*, 344 U.S. 486 (1952), further indicated that an appellate court on reversal could enter a judgment notwithstanding the verdict pursuant to FED. R. CIV. P. 50(b) provided that a timely motion for judgment notwithstanding the verdict had been made in the trial court. In the case at bar, such timely motion was made by CATM and denied by the trial court (JA 1242-43, 1446-48).

This Court itself has directed a district court to enter a judgment for a defendant notwithstanding a jury verdict and judgment for the plaintiff. *New York, N.H. & H. R.R.* v. *Henagan*, 364 U.S. 441 (1960). *Accord, United States* v. *Generes*, 405 U.S. 93 (1972).

The question raised by McQuade (Pet. 14) has been squarely met in *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), where certiorari was granted to consider whether a court of appeals could, consistent with the 1963 amendments to Rule 50 of the Federal Rules of Civil Procedure and consistent with the Seventh Amendment's guarantee of the right to jury trial, direct a trial court to dismiss an action after a jury verdict for plaintiff. This Court stated that there is no Constitutional bar to an appellate court's granting judgment notwithstanding the verdict and further found that Federal Rule of Civil Procedure 50(c) and (d) do not affect the propriety of such action. The status of the law at the time of the *Neely* decision was illustrated by the Court's citation (386 U.S. at 326) of decisions from all the ten courts of appeal involving reversal of a trial court's denial of a motion for judgment n.o.v. and directing the trial court to enter a judgment for defendant.

The Court of Appeals action in the case at bar is entirely consistent with the decisions of this Court. Timely motion for a judgment n.o.v. was made below and denied. On a careful review of the evidence, the Court of Appeals concluded that no violation of the Sherman Act had been proved and directed the district court to enter a judgment of dismissal (Pet. 22a), thus, in effect, finding that the motion for judgment n.o.v. should have been granted.

In answer to McQuade's suggestion that the Sherman Act restricts application of the *Neely* doctrine (Pet. 14-15), the Ninth Circuit took precisely the same action in *Joseph E. Seagrams & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), as the Fifth Circuit did in the case at bar. The Ninth Circuit reviewed a judgment pursuant to a jury verdict under Section 1 of the Sherman Act, found that the evidence was insufficient to make out a violation, reversed, and directed that the district court enter a judgment dismissing the action. Thereafter certiorari was denied.

The second question presented by McQuade is:

> May the Court of Appeals determine questions of fact in a case where the plaintiff has the right to a jury trial –
>
> (a) By reexamining the jury's decision as to the reasonableness of a collective refusal to deal?
>
> (b) By itself determining that a restraint of trade was reasonable, and not arbitrary or discriminatory? (Pet. 2).

Clearly this statement of the question presented does not fairly comprise a request that this Court review the factual conclusions of the Court of Appeals. This Court's Rule 23 provides that the statement of a question presented in a petition for writ of certiorari will be deemed to include every

subsidiary question fairly comprised therein, and further, that only the questions set forth in the petition or fairly comprised therein will be considered by the Court. *See also* Supreme Court Rule 40(1)(d)(2). Notwithstanding its narrow statement of the second question presented, McQuade embarks (Pet. 15-17) on a review of the Fifth Circuit's analysis of the record below. Having failed properly to present the question of the propriety of the conclusions reached by the lower court, this portion of McQuade's petition should not now be considered by this Court. *See Neely* v. *Eby Construction Co., supra* at 330, and *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428-29 (1964).

A further ground for summary disposition of McQuade's argument concerning the facts is presented by *United States* v. *Johnson*, 268 U.S. 220, 227 (1925), wherein Justice Holmes, speaking for a unanimous Court, stated: "We do not grant a certiorari to review evidence and discuss specific facts." *See also* the dissents of Justice Frankfurter in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), and *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 520 (1957).[7]

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[7]Regardless of the impropriety of McQuade's seeking a review of evidence by this Court, McQuade's misstatements should not be allowed to stand unchallenged.

McQuade states that the Court of Appeals gave no consideration to the alternative that the rules were "'applied in an unreasonable or arbitrary manner to the plaintiff's request for tour program'". (Pet. 15). Yet, in its own Petition, McQuade states that "the Court of Appeals made its own determinations . . . whether CATM's actions were arbitrary or discriminatory against McQuade" (Pet. 16) and that the court "opined that the rules were not applied to McQuade 'arbitrarily or discriminatorily'" (Pet. 16-17).

Actually, the Court considered the matter in detail and concluded:

> Nor were the rules applied to McQuade arbitrarily or discriminatorily. All interested tour operators, including McQuade, were on notice of the rules. The Miami Beach programs of eight other

operators were accepted, just as McQuade's were, on the condition that they provide proof of authority from the hotels. The other operators furnished express authorization; McQuade did not, choosing to rely on its tour operator agreement, which cannot reasonably be construed as giving McQuade the right to represent the hotels in the Manual. (Pet. 21a-22a).

McQuade suggests (Pet. 16, n.9) that the fact that CATM advised other tour operators by telegram concerning the necessity of submission of proper authorizations and failed to provide McQuade with such a telegram constitutes evidence of arbitrary application of the rules to McQuade. McQuade fails to mention the undisputed testimony that a representative of CATM repeatedly advised McQuade by telephone as to the insufficiency of McQuade's authorizations and the due dates of same. (JA 259, 892-93, 896-57, 902). Finally, McQuade was given a deadline of February 19, 1968, to submit authorizations although all McQuade's competing tour operators complied with the earlier deadline of February 9, 1968, assigned to them. (JA 904-05).

McQuade represents to this Court that the "Court of Appeals did not reexamine the record" (Pet. 15), in the face of such references by the court as "[t]he facts are important to our disposition of this appeal, so we must state them in some detail" (Pet. 2a), "there is no suggestion anywhere in the record" (Pet. 19a), "all the evidence points to the conclusion", (Pet. 20a), "there was undisputed evidence," (Pet. 21a), and "[t]here is not the slightest suggestion" (Pet. 21a).

McQuade takes issue with the Fifth Circuit's view of the Ft. Lauderdale-Sheraton situation and suggests (Pet. 16) that the telegram of the Ft. Lauderdale-Sheraton could reasonably be interpreted to support McQuade's position. The Court of Appeals stated (Pet. 20a):

> All the evidence points to the conclusion that CATM would have accepted either McQuade or American Express, leaving the choice entirely up to the Sheraton. As to the 1965 incident, therefore, any injury that McQuade might have suffered was attributable to the Sheraton, not CATM.

McQuade suggests that the Court of Appeals never considered whether the rules were necessary. (Pet. 16). In fact, the Court of Appeals not only concluded that the rules were "reasonable on their face" (Pet. 21a) but that

> ...there was undisputed evidence that responsible tour operators would not seek listing in the Manual without some assurance that other operators listed were themselves responsible; and failure to attract responsible operators would have doomed efforts to publish

the Manual. Finally, since several operators would be submitting programs for the same hotel, considerations of administrative convenience *required* proof that the operators were in fact authorized to represent a hotel in the Manual. (Pet. 21a, emphasis added).

Finally, McQuade suggests (Pet. 17) that the Court of Appeals never considered the reasonableness of excluding McQuade's Miami Beach program because of the defects in the alleged authorizations of the hotels. The Court of Appeals stated clearly that McQuade's authorizations could not reasonably be construed as giving McQuade the right to represent the hotels in the Manual. (Pet. 22a). In sum, it is entirely inappropriate for McQuade to suggest that the Court of Appeals did not carefully examine the record below when its opinion concluded as follows: "Thus, we hold that the facts in this case do not present a violation of the Sherman Act by CATM." (Pet. 22a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 11, 1972

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